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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-828

CURTIS CRAIG,
and
CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Appellants,

vs.

Hon. DAVID BOREN, Governor, State of Oklahoma,
Hon. LARRY DERRYBERRY, Attorney General,
State of Oklahoma,
Hon. D. M. BERRY, Chairman,
Hon. LAWTON L. LEININGER, Vice-Chairman,
Hon. J. L. MERRILL, Secretary-Member,
Oklahoma Tax Commission,
Hon. RAY WALL, Presiding Judge,
Ninth Judicial District Court, State of Oklahoma,
Hon. CHARLES H. HEADRICK, District Attorney,
Ninth Judicial District, State of Oklahoma,
Hon. ROSE JARVIS, District Court Clerk,
Payne County, State of Oklahoma,
Hon. FRANK PHILLIPS, Sheriff,
Payne County, State of Oklahoma,
and
Hon. HILARY DRIGGS, Chief of Police,
Stillwater, Oklahoma,
Appellees.

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

INDEX TO CITATIONS .....

SUMMARY .....

A. THE DECISION(S) BELOW 2

B. SUPREME COURT JURISDICTION 3

C. STATUTE(S) CHALLENGED 4

D. QUESTION(S) PRESENTED 5

E. STATEMENT OF THE CASE 7

F. THIS CASE IS SUBSTANTIAL 10

1. The Prior Appellate Adjudication of Substantiality 10

2. In General 11

3. Conflicts with Other Decisions 12

4. The Unsettled Question of the Relevant Test 13

5. The Sex-Alcohol "Combination" 14

6. The "Statistics" Issue 16

7. The Ultimate Sex-Equality Question 20

CONCLUSION 22

CERTIFICATE OF SERVICE 24

APPENDICES

APPENDICES

A. The Decision Below

B. The Judgment Below

C. Order Overruling Motion for New Trial

D. Notice of Appeal

E. Previous Single-Judge Dismissal

F. Tenth Circuits' Adjudication of Substantiality

INDEX TO AUTHORITIES

THE DECLARATION OF INDEPENDENCE 21

THE CONSTITUTION OF THE UNITED STATES 5, 20, 22

Amendment XIV 3, 5, 21

Due Process Clause 3, 5, 7

Equal Protection Clause .....vii, 3, 5, 6, 7, 10, 15, 16, 16, 18, 19, 20

Amendment XXI 14, 15

STATUTES

A. Federal

28 U.S.C. 1253 .....vii, 4

28 U.S.C. 1331 3

28 U.S.C. 1343 3

28 U.S.C. 1391-1393 3

28 U.S.C. 2201 3

28 U.S.C. 2281 .....2, 3

42 U.S.C. 1983 3

B. Oklahoma

37 O.S. 163.1, 163.2(a) 14

37 O.S. 241, 245 .....vii, 3, 4, 5, 7

COURT RULES

Supreme Court Rule 10 24

Supreme Court Rule 24

Federal Rule 12 2

Federal Rule 25 8

CASES

Patricia A v. City of New York (1972) 31 N.Y. 2d 83, 286 N.E. 2d 432 13

Bassett v. Bassett (Okla. App., 1974) 521 P.2d 434 ..... vii, 13

Brown v. Board of Education, 347 U.S. 843 20

California v. LaRue, 409 U.S. 109 ..... vii, 15

Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 ..... vii, 11, 16, 18, 19

Commonwealth v. Burke (Ky., 1972) 481 S.W.2d 52 ... 15

Cronin v. Adams, 192 U.S. 108 16

Daugherty v. Daley (N.D. Ill., 1974) 370 F. Supp. 338 15

Dean v. Crisp (Okla. Cr., 1975) 536 P.2d 961 13

DeFunis v. Odegaard (1973) 82 Wash.2d 11, 507 P.2d 1169 12

Ex Parte Matthews (Tex. Cr., 1973) 488 S.W.2d 434 13

Frontiero v. Richardson, 411 U.S. 677 ..... vii, 4, 5, 11, 12, 15, 23

Geduldig v. Aiello, 417 U.S. 484 ..... 4, 11, 12

Goesaert v. Cleary, 335 U.S. 464 ..... vii, 4, 16

Harrigfeld v. District Court (1973) 95 Idaho 540, 511 P.2d 822 13

Jackson Mun. Sep. Sch. Dist. v. Evers (5th Cir., 1966) 357 F.2d 653 ..... vii, 20

Kahn v. Shevin, 416 U.S. 351 12

Lamb v. Brown (10th Cir., 1972) 456 F.2d 18 .. vii, 10, 13

Lamb v. State (Okla. Cr., 1970) 475 P.2d 829 17

Leary v. United States, 395 U.S. 6 19

Peterson Tavern & Grill Owners' Assn. v. Borough of Hawthorne (1970) 47 N.J. 180, 270 A.2d 628 ... 15

Phelps v. Bing (1974) 58 Ill.2d 32, 316 N. N.E.2d 775 13

Phillips v. Martin-Marietta Corp., 400 U.S. 542 11

Reed v. Reed, 404 U.S. 71 ..... 11, 12

Sail'er's Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 485 P.2d 529 15

Schlesinger v. Ballard, 419 U.S. 498 ..... 4, 11, 12

Stanley v. Illinois, 405 U.S. 645 ..... vii, 11, 16, 19

Stanton v. Stanton, _____ U.S._____, 43 L. Ed.2d 514, 95 S. Ct. 1373 .... vii, 5, 10, 11, 12, 13, 23

State v. Chambers (1973) 63 N.J. 287, 307 A.2d 78 ..... vii, 22

State Board v. Young's Market Co., 299 U.S. 59 15

State ex rel. Springer v. Bliss (1947) 199 Okla. 198, 185 P.2d 220 14

Stell v. Savannah-Chatham Co. Bd. 220 F. Supp. 667, 255 F. Supp 83, 88 (S.D. Ga., 1963, 1966). 333 F.2d 55, 387 F.2d 486 (5th Cir., 1964, 1966) 20

Ting v. Ping (N.D., 1973) 209 N.W.2d 624 13

Walker et al. v. Hall et. al., 10/23/1973, 10th Cir., No. 73-1267 (unreported) 2, 11

Weinberger v. Wiesenfeld, _____ U.S. _____, 43 L. Ed.2d 514, 95 S. Ct. 1225 ..... 4, 11

White v. Fleming (E.D. Wisc., 1974) 374 F. F. Supp, 267 15

Women's Liberation Union v. Israel (1st Cir., 1975) 512 F.2d 106 15

SUMMARY

This is a direct appeal, 28 U.S.C. 1253, from a three-judge District Court decision upholding the constitutionality of the age-sex discrimination in the Oklahoma liquor laws, 37 O.S.A. 241, 245, allowing females to buy 3.2% beer at age 18, but prohibiting males therefrom till age 21.

Substantiality is premised upon an express finding of "a substantial federal constitutional question" herein by the Tenth Circuit (Appendix F), and upon the obvious conflict with such controlling decisions as *Stanton* v. *Stanton*, 95 S.Ct. 1373, *Frontiero* v. *Richardson*, 411 U.S. 677, and even the locally-cognizable *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, and *Bassett* v. *Bassett* (Okla. App., 1974) 521 P.2d 434.

Other substantial issues posed include that of the relevant test for sex-equality claims, left unresolved in *Stanton* v. *Stanton*; whether sexual and related discriminations are somehow more tolerable with respect to alcohol, *Goesaert* v. *Cleary*, 335 U.S. 464, cf. *California* v. *LaRue*, 409 U.S. 109; the misuse of "statistics" to "prove" male "inferiority," see *Jackson* v. *Evers* (5th Cir., 1966) 357 F.2d 653; the irrebutable penalization of one entire sex for the alleged indiscretions of one or two percent thereof, *Stanley* v. *Illinois*, 405 U.S. 645, *Cleveland* v. *LaFleur*, 414 U.S. 632; and the paramount supremacy of Equal Protection even assuming a male inferiority, see *State* v. *Chambers* (1973) 63 N.J. 287, 307 A.2d 78 (concurring opinion, at 85).

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Ninth Judicial District, State of Oklahoma,
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Payne County, State of Oklahoma,
Hon. FRANK PHILLIPS, Sheriff,
Payne County, State of Oklahoma,
and
Hon. HILARY DRIGGS, Chief of Police,
Stillwater, Oklahoma,
Appellees.

JURISDICTIONAL STATEMENT

Come now Appellants, Curtis Craig, and Carolyn Whitener d/b/a "The Honk and Holler," and for their Jurisdictional Statement herein respectfully allege and aver as follows:

A. THE DECISION(S) BELOW

The decision whose review is sought herein is styled *Mark Walker, et al.* v. *Hon. David Hall, Governor, et al.*, and was rendered by the United States District Court for the Western District of Oklahoma, sitting as a three-judge panel pursuant to 28 U.S.C. 2281 et seq, in Western District of Oklahoma Case No. CIV-72-867, on May 17, 1975. The decision ("Memorandum Opinion") is unreported, but is reproduced at Appendix A hereto. A separate "judgment" was likewise entered on the same date, which is also unreported, but reproduced at Appendix B hereto. A timely and proper motion for new trial (filed on May 27, 1975) was overruled on July 14, 1975, which order overruling same, also unreported, is reproduced at Appendix C hereto; and a timely and proper notice of appeal, reproduced at Appendix D hereto, was filed with the Clerk of the United States District Court for the Western District of Oklahoma on August 11, 1975.

There were also two previous decisions, both unreported, in this litigation. The first of these was the "Order of Dismissal" herein, entered by the U.S. District Court for the Western District of Oklahoma, sitting as a single judge, on February 14, 1973 (Appendix E hereto), in effect granting the Appellees' Rule 12(b)(6) motion to dismiss. The other was the decision on appeal from the single District Judge's dismissal, entered by the United States Court of Appeals for the Tenth Circuit sub nom. *Walker, et al.* v. *Hon. David Hall, Governor, et al.*, 10th

Cir., No. 73-1267, on October 23, 1973, wherein a unanimous panel of the Tenth Circuit concluded that the Complaint did in fact raise "a substantial federal constitutional question," and therefore vacated the single District Judge's dismissal and remanded the cause back to the U.S. District Court for the Western District of Oklahoma for trial and determination by a panel of three judges pursuant to 28 U.S.C. 2281 et seq (Appendix F hereto).

B. SUPREME COURT JURISDICTION

The action below was a civil rights complaint, 42 U.S.C. 1983, brought in the United States District Court for the Western District of Oklahoma under 28 U.S.C. 1331, 1343(3), 1343(4), 1391(b), 1392(a), and 1393(b), for a declaratory judgment, 28 U.S.C. 2201 et seq, to judicially determine and adjudicate as unconstitutional as violative of Fourteenth Amendment Equal Protection and Due Process a certain State statutory scheme, 37 Okla. Stat. Ann. 241, 245, allowing females to purchase 3.2% beer at age 18, but irrationally and invidiously prohibiting males from purchasing same until age 21. Since further relief by way of writs of injunction to enjoin the enforcement of this unconstitutional age-sex discriminatory State statute was also sought, the matter was [eventually] tried to a three-judge District Court under 28 U.S.C. 2281 et seq.

As stated under Part A, supra, the decision and judgment herein appealed were entered on May 17, 1975; the motion for new trial was overruled on July 14, 1975; and the notice of appeal was filed with the Clerk of the District Court on August 11, 1975. See Appendices A-D hereto. And on October 8, 1975, Mr. Justice White granted a timely motion to extend the docketing time for this appeal to October 25, 1975. October Term, 1975, No. A-316.

Jurisdiction to review the three-judge District Court decision below by direct appeal is conferred upon the Supreme Court by 28 U.S.C. 1253. Cases illustrative of the Supreme Court's actual exercise of such direct appellate jurisdiction over three-judge District Court decisions involving sex-equality questions include *Goesaert* v. *Cleary* (1948) 335 U.S. 464, *Frontiero* v. *Richardson* (1973) 411 U.S. 677, *Geduldig* v. *Aiello* (1974) 417 U.S. 484, *Schlesinger* v. *Ballard* (1975) 419 U.S. 498, and *Weinberger* v. *Wiesenfeld* (1975)____ U.S.____, 95 S.Ct. 1225, 43 L.Ed.2d 514.

C. STATUTES(S) CHALLENGED

This action directly challenges the constitutionality of 37 Okla. Stat. Ann. 241, 245, which taken together permit the sale of 3.2% beer for off-premises consumption to females at age 18, but discriminatorily and invidiously prohibit the sale thereof to males until age 21. These statutes read as follows:

MINORS

§241. Sale, barter or gift to minor unlawful.—It shall be unlawful for any person who holds a license to sell and dispense beer and/or any agent, servant, or employee of said license holder to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) per cent of alcohol measured by weight. Provided, a parent as regards his own child or children, is excepted from the provisions of this Act.

§245. "Minor" defined.—A "minor", for the purposes of Sections 241 and 243 of Title 37 of the Oklahoma Statutes, is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years.

Section 241, supra, can be found at page 2534 of Volume 2 of the [official] "Oklahoma Statutes, 1971," and Section 245, supra, is found at page 391 of the [official] "Oklahoma Statutes, 1974 Supplement." [The 1975 Supplement to the official Oklahoma Statutes has not yet been published.]

D. QUESTION(S) PRESENTED

The ultimate question behind this appeal, and indeed this entire litigation, is, simply, whether 37 O.S. 241, 245, supra, permitting girls to buy 3.2% beer at age 18 while capriciously prohibiting men therefrom until age 21, is unconstitutional as repugnant to the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution, especially as construed in such cases as *Stanton* v. *Stanton* (1975)____ U.S.____, 95 S.Ct. 1373, 43 L.Ed.2d 688, and *Frontiero* v. *Richardson* (1973) 411 U.S. 677.

This particular case analyzes the foregoing ultimate question into a number of lesser-included questions, such as:

Just what is the test for determining the constitutionality of statutory age-sex discriminations such as that at bar: the "suspect classification" test, or the "rational relationship" test, or the "something in between" test—all as expressly left unresolved in *Stanton* v. *Stanton*, supra, 95 S.Ct. at 1377?

Regardless of what the proper test might be, may an age-sex discrimination such as that at bar be sustained, as it was by the District Court, on the basis of a "statistical" showing that *one or two percent* of the *unfavored* sex display a degree of irresponsibility with respect to certain activity, as opposed to only a smaller percentage of the *favored* sex displaying such irresponsibility?

Phrased somewhat differently, if, say, "statistics" show that about two percent of the unfavored sex have been arrested for alcohol-related offenses, as opposed to somewhat less than one percent of the favored sex, is this statistical differentiation sufficient to erect a "permanent irrebutable presumption of fact" which can justify excluding the *entirety* of that one sex (within a certain age group), *including the innocent 98%*, from access to legally *non*-intoxicating 3.2% beer, while at the same time conferring upon the entirety of the other sex (within the same age group), including even the *guilty* portion thereof, *unrestricted* access to such alcoholic beverages?

Related to the foregoing is the question of whether the Equal Protection Clause only applies in a "watered down" sense with respect to State legislation regarding intoxicating (and *a fortiori*, *non*-intoxicating) liquors, so as to allow a certain degree of latitude to State discriminations regarding alcohol on the basis of sex (or of race, or religion, or economic status, or any other such "criterion" in passing vogue with a legislative majority)?

And, if "statistics" are to be deemed an appropriate basis upon which to justify invidious statutory discriminations based on sex (or race, or religion, etc.), under whatever may be the test for the constitutionality vel non of such discriminations, then what kind of judicial safeguards are to be erected around the use and admission of such statistics in constitutional litigation? To take the decision of the District Court below as an example, are mere *arrest* (i.e., *accusation*) statistics, as opposed to actual *conviction* statistics, to be deemed a sufficient justification for the penalization of one entire sex (or race, or creed, or class)? How also are we to insure

against various biases in the collection and compilation of such statistics? And how widespread must a certain behaviour be amongst the target sex (or race, religion, class) before we have a statistically valid sampling sufficient to declare, as did the District Court, the *entire* sex (race, religion, class) so characterized thereby?

In other words, if only one or two percent of a certain sex or similar "classification" is even so much as *accused* of having a particular deleterious propensity, may we properly punish that *entire* classification; or does not Due Process of Law require some "less drastic alternative" to be implemented, directed more discerningly at the one or two percent of "troublemakers" within the classification, rather than allowing blind resort to the bureaucratically easier-to-administer "mass punishment" approach?

E. STATEMENT OF THE CASE

As stated earlier herein, this action has been from its inception an Equal Protection and Due Process attack on the Oklahoma statutory scheme, 37 O.S. 241, 245, which prohibits the sale of 3.2% beer to males in the 18 to 21 year old age group while freely allowing the sale thereof to the female members of the identical age group. Therefore, the claim of Federal unconstitutionality was squarely raised in the Complaint.

The Plaintiffs were originally one Mark Walker, a young male student at Oklahoma State University, Stillwater, Oklahoma, then 20 years of age, and Mrs. Carolyn Whitener, a licensed retail vendor of [*inter alia*] 3.2% beer at the "Honk and Holler" drive-in convenience store in Stillwater. During the pendency of this litigation Mark Walker passed his 21st birthday, whereupon one of his fraternity brothers, Curtis Craig, who is still under

21, joined the case as an additional Plaintiff. Curtis Craig and Mrs. Whitener are the present Appellants. Mr. Craig is desirous of purchasing 3.2% beer, and Mrs. Whitener in selling it to him, all on a parity as freely allowed to 18 to 21 year old females, but both are thwarted therefrom by the statutes in question, wherefore declaratory and injunctive relief is sought.

The Defendants (Appellants herein) are generally the State officials who are charged with the enforcement of the statutes in question. As none of the Defendants has had any personal interest in this litigation aside from his official capacity, and since only declaratory and injunctive relief has been sought, counsel for both sides have simply been substituting Defendants (see Federal Rule of Civil Procedure No. 25(d)) as the various State offices have changed incumbents.

After all "procedural" problems were resolved at a pre-trial conference, this case was tried to the three-judge panel squarely on the merits of the claim of unconstitutionality herein. The evidence adduced by the Plaintiffs, Appellants herein, consisted essentially of the expert testimony of a practicing psychiatrist, holding a baccalaureate in biology and chemistry as well as an M.D. degree, and a professor of biological psychology at the University of Oklahoma Medical School's Center for Alcohol-Related Studies. These two witnesses testified affirmatively that there is absolutely no chemical, biological, anatomical, medical, psychiatric, psychological, social, or similar basis whatsoever for the statutory discrimination in question; in fact, the O.U. professor testified in particular to a series of experiments that he himself had conducted into the difference between young adult males and females in their responses to alcohol, the results of which experiments established that the

male is actually somewhat superior to the female in his capacity to handle equivalent amounts of alcohol. The Plaintiffs also adduced certain 1970 Census statistics, showing the number of 18 to 21 year old males and females in Oklahoma.

The evidence adduced by the Defendants, Appellees herein, was entirely statistical. In essence, their other exhibits were consistent with and cumulative to their Exhibit One, the 1973 State-wide arrest statistics for alcohol-related offenses in Oklahoma. These statistics tended generally to indicate that while about 98.00% of Oklahoma's 18 to 21 year old male citizenry had *not* been arrested in 1973 for Driving While Intoxicated and Public Drunk violations, nevertheless, an even greater percentage, 99.82%, of the like-aged female population had not been so arrested.

The District Court overruled the Plaintiffs' objections to the Defendants' statistics, one chief of which objections was that these data were mere *arrest* statistics, not *conviction* statistics, and were therefore totally incompetent to prove or disprove anything about either (or both) of the two sexes in question; and, after evidently placing greater credence in the Appellees' statistics than in the Appellants' expert testimony, the District Court next rejected the argument that the difference between the 98.00% male sobriety rate and the 99.82% female sobriety rate was too inconsequential to justify a prohibition regarding 3.2% beer against all males but against no females in the referenced age group. Instead, the Court decided to take cognizance *only* of the microscopic percentages of either sex that had suffered alcohol-related arrests, and then concluded that since within those minute and statistically anamolous percentages (2.00% for the boys and 0.18%

for the girls) there appeared to be *some* differential between the sexes, this differential amongst those few of either sex having the problem sufficed to sustain the discrimination of no males and all females under the "rational relationship" test, which the Court declared to be the relevant test governing sex-equality questions, at least in the regulation of non-intoxicating beer, which the Court felt was somewhat less subject to Equal Protection scrutiny than other areas of State regulation.

The Court also rejected as an administrative burden the plea that some sort of a sexually neutral testing system be established to identify the actual irresponsible members of each sex, which the Appellants had urged as a constitutionally-required "less drastic alternative" to the statute's illogical premise that the goal of denying 3.2% beer to those very few young adults not deserving access thereto could best be achieved by a blanket denial thereof to the entirety of one sex and a blanket allowance thereof to the entirety of the other sex. Finally, the District Court distinguished such contrary age-sex rulings as *Stanton* v. *Stanton*, supra, 95 S.Ct. 1373, and *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, on the basis that whereas those age-sex discriminations had been founded on untenable "old notions" and ill-defined "facts of life," the instant age-sex discrimination was shown to be based on competent bio-scientific evidence.

This, in a nutshell, is the case at bar.

F. THIS CASE IS SUBSTANTIAL

1. The Prior Appellate Adjudication of Substantiality

The Appellants would at the outset advise the Court that their case has *already* been squarely adjudicated to

present "a substantial federal constitutional question," by the U.S. Court of Appeals for the Tenth Circuit, to which they have previously resorted in order to get this matter heard by a three-judge panel. *Walker, et al.* v. *Hon. David Hall, Governor, et al.*, 10th Cir., No. 73-1267, October 23, 1973 (Appendix F hereto), a decision, incidentally, rendered by a unanimous panel which was not only presided over by the Chief Judge thereof, but was also graced by the presence of a former member of *this* Honorable Court, to wit: Mr. Justice Tom Clark, retired, sitting by designation.

2. In General

Appellants also invite attention to the fact that in recent years there has been no dearth of other sex-equality cases decided by three-judge District Courts that have been deemed sufficiently "substantial" to merit the assumption and exercise of appellate jurisdiction by the Supreme Court under 28 U.S.C. 1253, to wit: *Frontiero* v. *Richardson*, 411 U.S. 677, *Geduldig* v. *Aiello*, 417 U.S. 484, *Schlesinger* v. *Ballard*, 419 U.S. 498, and *Weinberger* v. *Wiesenfeld*, _____ U.S. _____, 43 L.Ed.2d 514, 95 S.Ct. 1225. In fact, recent years have witnessed such a growth in the substantiality of the whole sex-equality question as to merit the repeated review thereof by writs of *certiorari*, whether such questions were posed in constitutional terms, see *Reed* v. *Reed* (1971) 404 U.S. 71, *Stanton* v. *Stanton* (1975) _____ U.S. _____, 43 L.Ed.2d 688, 95 S.Ct. 1373, or statutorily, see *Phillips* v. *Martin Marietta Corp.* (1971) 400 U.S. 542; even the periphery of the sex-equality question has claimed the Court's attentions, see *Stanley* v. *Illinois* (1972) 405 U.S. 645, and *Cleveland Board of Education* v. *LaFleur* (1974) 414 U.S. 632.

3. Conflicts With Other Decisions

Certainly the instant case is substantial in terms of its evident conflict with the almost squarely-in-point *Stanton* v. *Stanton*, supra, 95 S.Ct. 1373, rendered shortly before the District Court's decision herein, and with the antecedent *Frontiero* v. *Richardson* (1973) 411 U.S. 677, and *Reed* v. *Reed* (1971) 404 U.S. 71. Nor can the District Court's ruling be justified by its apparent reliance on what are loosely called the Court's "sex-*in*equality" decisions, of *Geduldig* v. *Aiello* (1974) 417 U.S. 484, *Schlesinger* v. *Ballard* (1975) 419 U.S. 498, or *Kahn* v. *Shevin* (1974) 416 U.S. 351. *Geduldig* was not strictly a sex-equality case at all; it dealt with certain anatomical and medical aspects of actual pregnancy, and, as noted by Mr. Justice Stewart, was more properly a differention for actuarial purposes not between males and females, but between pregnant persons and non-pregnant persons, fn. 20, 417 U.S. at 496. Likewise, *Ballard* was *not* a case of discrimination between males and females *similarly* situated, but between male and female Naval officers *not* similarly situated, 95 S.Ct. at 578. *Kahn* comes perhaps the closest to "justifying" discriminations based on sex, but again, there was a limitation therein: that of partial compensation for the effects of past discrimination, not unlike the racially benign "quota" concept, see *DeFunis* v. *Odegaard* (1973) 82 Wash.2d 11, 507 P.2d 1169. But surely the reasoning of *Kahn* is inapplicable to the case at bar, unless we assume that the State Legislature intended to let young women seek in 3.2% beer their solace for past injustices.

The instant case is especially substantial in that, being an *age*-sex discrimination, it not only conflicts with the *Supreme* Court's paradigm pronouncement

thereon in *Stanton* v. *Stanton*, 95 S.Ct. 1373, but with just about every other modern ruling on the same subject as well. See, e.g., *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18; *Patricia A.* v. *City of New York* (1972) 31 N.Y. 2d 83, 286 N.E. 2d 432; *Ex Parte Matthews* (Tex. Cr., 1973) 488 S.W. 2d 434; *Ting* v. *Ping* (N.D., 1973) 209 N.W.2d 624, *Harrigfeld* v. *District Court* (1973) 95 Idaho 540, 511 P.2d 822; and *Phelps* v. *Bing* (1974) 58 Ill.2d 32, 316 N.E.2d 775. In fact, even the *Oklahoma* courts now reject age-sex discriminations as unconstitutional! *Bassett* v. *Bassett* (Okla. App., 1974) 521 P.2d 434, cf. *Dean* v. *Crisp* (Okla. Cr., 1975) 536 P.2d 961. So far as Appellants have discovered, the District Court's ruling is the *only* decision presently extant still upholding the age-sex discrimination concept.

4. The Unsettled Question of The Relevant Test

But the instant case is substantial for a number of original reasons as well. One is the District Court's own admitted uncertainty over what test for unconstitutionality should have been applied to the discrimination at bar — an uncertainty that the District Court viewed as emanating in truth from the *Supreme* Court's failure, at least as yet, to resolve the matter. See pp. A5-A8, A16-A17, and A19, infra. Indeed, in its recent *Stanton* v. *Stanton*, 95 S.Ct. at 1377, 1379, the Honorable Supreme Court *expressly* left undecided the question of whether sexual discriminations are to be reviewed under a "compelling state interest — or rational basis — or something in between" test. Appellants earnestly urge that the prompt resolution of this question *is* a matter of substantial Federal importance, for given the plethora of sex-equality litigation that has arisen in recent years, the continued unsettledness of

what test to apply will only result in the blind groping for varying standards, as evidenced by this case, being repeated and multiplied in scores, even hundreds, of similar lawsuits, to the Public's extreme disadvantage.

And, while Appellants retain their faith that the instant discrimination is unconstitutional under *any* of the possible tests, still, the District Court, while evidently acknowledging its unconstitutionality under the "suspect classification" test, nevertheless upheld it under the "rational relationship" test. *If*, therefore, the District Court's analysis be correct, then this instant case *does* squarely present the "relevant test" question, which is as yet unresolved but which ought to be decided at the earliest opportunity.

5. The Sex-Alcohol "Combination"

Related to the "relevant test" question is the evident sentiment by the District Court that irrespective of whatever that test is or may be, it does not seem to apply with its otherwise force and vigor to sexual discriminations erected in the area of alcoholic beverages, because of the Twenty-First Amendment. Of course, that Amendment, by its own terms, refers only to "*intoxicating* liquors," whereas 3.2% beer is *non*-intoxicating, 37 O.S. 1971, Sections 163.1, 163.2(a).[1] But passing the question of the precise quantum of alcohol required before the Twenty-First Amendment obtains, and recognizing that the District Court did vacillate somewhat on the question of how much the relevant test for sexual and related discriminations is actually to be "diluted" in the realm of intoxicants (see pp. A6, A14-A15, A19, infra), the District Court's "exemption"

[1]Interpreted to mean just exactly that in *State ex rel. Springer* v. *Bliss* (1947) 199 Okla. 198, 185 P.2d 220.

from Equal Protection scrutiny for discriminations regarding alcohol, evidently inferred from the "sex-alcohol" case of *California* v. *LaRue* (1972) 409 U.S. 109, and the famous dictum in *State Board* v. *Young's Market Co.* (1936) 299 U.S. 59, 64,[2] is substantial for two reasons: the short reason being the question it raises, assuming a Twenty-First Amendment tolerance for *sexual* discriminations regarding alcohol, of equally tolerable *racial* (and related) discriminations under the same Amendment (as construed). Certainly *this* conclusion which the District Court apparently inferred from *LaRue* and *Young's Market Co.* demands plenary review. And the second "substantiality" to the District Court's diminished Equal Protection scrutiny for sexual discriminations in alcohol lies again in the fact that, like the unanimously contrary age-sex authorities, discussed supra, page 13, virtually *all* the modern alcoholic-sex-equality cases go directly *contra* to the District Court's conclusion. *Sailer's Inn, Inc.* v. *Kirby* (1971) 5 Cal. 3d 1; 485 P2d 529,[3] *Peterson Tavern & Grill Owners' Assn.* v. *Borough of Hawthorne* (1970) 47 N.J. 180, 270 A.2d 628, *Commonwealth* v. *Burke* (Ky., 1972) 481 S.W.2d 52; and, on the Federal level, *White* v. *Fleming* (E.D.Wisc., 1974) 374 F.Supp. 267, *Daugherty* v. *Daley* (N.D.Ill., 1974) 370 F.Supp. 338 (three-judge court), and *Women's Liberation Union* v. *Israel* (1st Cir., 1975) 512 F.2d 106.

In fact, to find any "authority" to sustain sexual discriminations in the alcoholic context one really must retreat all the way back to such grotesque antiquities as

[2]"A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

[3]From certain language whereof, 485 P.2d at 540, came almost *verbatim* the key language in *Frontiero* v. *Richardson* (1973) 411 U.S. 677, at 686-687!

Goesaert v. *Cleary* (1948) 335 U.S. 464, and *Cronin* v. *Adams* (1904) 192 U.S. 108; and while the District Court prudently avoided any reliance on these cases, the very fact that the instant case *does* involve a sexual discrimination in the context of alcohol means that the Supreme Court is finally presented with its long-awaited opportunity to *squarely overrule Goesaert* and *Cronin* once and for all (as well as to clarify the true scope of *LaRue*).

6. The "Statistics" Issue

We next come to what Appellants submit makes the opinion below not only erroneous and "substantial," but in a sense even a *dangerous* decision: namely, that solely on the basis of "statistics" the fundamental American guarantee of Equal Justice Under Law was rendered wholly nugatory. This Jurisdictional Statement is not, of course, the time or place for a detailed discussion of the Appellees' statistical exhibits adduced at the trial below; but Appellants would submit that *any* employment of "statistics," especially an exclusive employment thereof, as a basis for denying the Equal Protection of the Laws is *per se* "substantial" in a constitutional sense, for, as we all know, virtually *anything* can *somehow* be "proven" with "statistics."

Let us but briefly look at how, in several particulars, "statistics" were employed herein to *sustain* a "permanent irrebuttable presumption of fact", see *Cleveland Board of Education* v. *LaFleur* (1974) 414 U.S. 632, at 643-647, and *Stanley* v. *Illinois* (1972) 405 U.S. 645, at 653-658, that *no* male 18-21 shall be trusted with 3.2% beer, although even the drunkenest of such-aged females may purchase it in unlimited amounts.

a) The "statistics" relied on by the District Court were *arrest*, not *conviction* statistics. In fact, *no* instance of an actual alcoholic *violation* was ever established by *any* of the Defendants' exhibits. And if an *individual* cannot be punished by a mere arrest, may an entire sex be so condemned?

b) The statistics fail to establish the actual *number* of males even *accused* of alcohol-related offenses. That is, taking the State-wide 1973 datum of 1393 arrests, does that "statistic" refer to 1393 males arrested one time apiece, or 139.3 males arrested 10 times apiece? We are not told. It *could* mean no more than that *one* male got arrested 1393 times in 1973.

c) These "statistics" could easily be and undoubtedly were the results of biased or "selective" law-enforcement attitudes and practices, which traditionally have sought out the youthful male offender for harsher treatment than the youthful female offender, see *Lamb* v. *State* (Okla.Cr., 1970) 475 P.2d 829. For example, in the Defendants' Exhibits 1 and 2 there was a *third* category of alcohol-related offenses, "Other," meaning everything that was neither "DWI" nor "Public Drunk." These "Other" offenses included, to some indeterminate degree, "working as a minor in a beer joint" and "possession of beer by a minor," which are *defined* in terms of females under 18 and males under 21. *Naturally* there would be more of these "Other" offenses among 18-21 males than 18-21 females. And although the District Court omitted any reference to these "Other" statistics in its decision, nevertheless, at the trial this very objection thereto was overruled as going merely to the "weakening" of these statistics, not their *admissibility*!

d) The *traffic* accident statistics relied on by the District Court are at best of conjectural relevance. They do indicate more young males than young females injured in traffic accidents, but there is no showing that these accidents were alcohol-related. And *how* could there be any conceivable relevance to the fact that more male *passengers* are injured annually than female passengers? (See p. A10-A11, A30-A31, infra). Even if the age-sex discrimination at bar were, say, 18 for girls and 21 for boys to get *drivers' licenses* (rather than to drink beer), what is proven by more male *injuries* than female? Does "injury" mean "fault?" Rather than a greater male "recklessness," an equally logical explanation of these "data" would be that there are simply more males than females actually on the road. For instance, let us assume that males do 20 times as much driving as females, and have 10 times as many accidents as females. A skillful "statistics" manipulator could 'truthfully' testify *either* way in an Equal Protection lawsuit: either than men are ten times more reckless than women, or that women are twice as reckless as men.

e) Taking this just-cited hypothetical as an example, we come to the essential ambivalence in *this* case. That is, even accepting the statistics herein at their worst, we see that in Oklahoma in 1973 there were 1393 arrests for alcohol-related offenses (427 DWI plus 966 Public Drunk) for 18-21 year old males, and 126 such arrests (24 DWI and 102 Public Drunk) for like-aged girls. But there were also 69,688 18-21 year old boys in Oklahoma at the time, and 68,507 girls. Thus, if we view *only* these 18-21 year olds actually arrested for alcohol, the male-to-female ratio is about 11 to 1, which satisfied the District Court. But taking these identical statistics, we see that the male-female *non*-arrest rate is essentially *equal* (98.00% vs. 99.82%).

A second hypothetical example might clarify the point. In a racially mixed community of 100,000 Caucasians and 100,000 Negroes, let us assume that in some particular year 10 Caucasians and 100 Negroes are *arrested* for "vagrancy." Assuming that "control of shiftlessness" is deemed a legislatively permissible goal for some statutory discrimination, which "statistic" would govern in a Federal anti-discrimination lawsuit: the "datum" that the Negro "shiftlessness" rate is fully *ten times* that of the Caucasians? Or, that the Black-White *non*-shiftlessness ratios are essentially *equal*?

Without arguing in this Jurisdictional Statement which view is the correct one for Federal Judges to take in Equal Protection cases, Appellants would nevertheless submit as "substantial" their challenge to the District Court's assumption that Equality is to be granted or withheld according to the tribunal's capricious decision to disregard the essential alcoholic equality-in-fact between the two sexes *as a whole*, and instead to concentrate only upon that tiny minority within *both* sexes displaying the problem, and then letting some percentage differential within that atypical, anomolous minority dictate Equality vel non for the other 99 or so percent of the population. See *Cleveland Board of Education* v. *LaFleur*, supra; *Stanley* v. *Illinois*, supra; cf. *Leary* v. *United States* (1969) 395 U.S. 6, at 32-54.

In other words, since in the record at bar we have a graphic and glaring example of how the misuse of nebulous, meaningless, and highly contradictory "statistics" can render the Equal Protection Clause absolutely nugatory, the instant case presents an excellent vehicle for the Supreme Court to establish appropriate guidelines and safeguards for the judicial employment of statistical data in this and future sexual (or racial,

religious, class) discrimination lawsuits. [If, indeed, "statistics" to "prove" some group's "inferiority" are Federally cognizable at all. Recall the fate of the "statistics" attempt to "overrule" *Brown* v. *Board of Education*, 347 U.S. 843, in *Stell* v. *Savannah-Chatham Co. Bd. of Educ.* (S.D.Ga., 1963) 220 F.Supp. 667, reversed 333 F.2d 55, at 60-61 (5th Cir., 1964) cert. den. sub. nom. *Roberts* v. *Stell*, 379 U.S. 933, "restatisticked" 255 F.Supp. 83, 88 (1966), and reversed again 387 F.2d 486, 489-490; and *Jackson Municipal Separate Sch. Dist.* v. *Evers* (5th Cir., 1966) 357 F.2d 653, cert. den. 384 U.S. 961, rejecting a similar "statistics" approach.]

6. The Ultimate Sex-Equality Question

Finally, and although the Appellants view the "statistics" at bar as wholly incompetent under all theories of law to prove or disprove anything about the characteristics of either of the two sexes involved in this lawsuit, there still remains a sex-equality question as yet untouched by the Court in any case to date — that being, even if there *be* some true behavioural differentiation between the sexes, in a general if not a strictly individual sense, does not Equal Protection still apply anyway between male and female Americans? For instance, let us assume that at some future time it *be* completely established, as with better microscopes, chemical sensors, or the like, that the "old notions" of, say, masculine "aggressiveness" and feminine "passivity," and related "facts of life," *do* in truth have an organic or biological basis, that males and females *are* behaviourally different innately, and that the two sexes are not completely "equal" in their various capacities and competences. If this should ever be competently proven, what *then* of Equality under the American Constitution? So far the sex-equality cases

have studiously avoided confronting this "ultimate" sex-equality question, and have instead preferred to perceive no "essential" differences between men and women for the purposes of a particular discrimination in issue, or when denying equality, have tended to do so on the basis of some overtly physical, not on a behavioural or subtly biochemical, basis. So to take our present case as an example, would the District Court's decision be correct if there actually *were* some competently demonstrable male inferiority with respect to alcohol? Or does not that Equality proclaimed by the Declaration of Independence as well as guaranteed by the Fourteenth Amendment, which surely obtains notwithstanding *individual* inequalities-in-fact, also obtain despite various *collective* inequalities-in-fact?

As stated, most cases so far have striven to avoid this "ultimate" sex-equality question; though yet unanswered, however, it has not gone wholly unnoticed:

> "...an individual female cannot constitutionally be given more severe sentencing treatment for the same offense than that by law accorded males as a class on the basis of any characteristics thought *or even proved* to be applicable to females generally, or as to most of them.
>
> "I would therefore join in the decision of the court *even if the record here justified the factual conclusion* that most female offenders, or female offenders generally, are better subjects for rehabilitation than males, or less recidivist, or that a longer period of detention would promote the chances for rehabilitation of female offenders generally as opposed to male offenders generally."

Conford, J., concurring specially in *State* v. *Chambers* (1973) 63 N.J. 287, 307 A.2d 78, at 85 (emphasis added).

Therefore, *if* the Court should feel that the statistics admitted into the instant record *do* competently establish some degree of actual male inferiority with respect to alcohol, *then* this case poses the "ultimate" question of whether or not American Equality governs *anyway* — not only a "substantial" but also a most fitting Bicentennial question for our Highest Court to answer.

CONCLUSION

Had the decision herein sustained, under *any* theory of law or "statistical showing," an age-*racial* discrimination like that at bar, of allowing Caucasians to purchase 3.2% beer at age 18 while prohibiting Negroes therefrom till age 21, or had it sustained an age-*religious* discrimination, allowing Protestants beer at 18 while keeping Catholics therefrom till 21, the question would not be that of "substantiality," but simply, whether the *error* therein could be deemed so beyond dispute as to merit summary reversal by memorandum order rather than by plenary review with formal briefs and oral argument. Appellants submit that law, logic, and Constitution require no less for the instant age-*sex* discrimination.

If, on the other hand, there be deemed something mystically different about *sexual* discriminations such as to suggest a sentiment that the instant age-sex decision might *not* merit the same summary reversal as a like age-racial or age-religious validation, then this case is *per se* sufficiently substantial to find out *why* not.

Appellants therefore pray that the decision below be summarily reversed on the strength of *Stanton* v. *Stanton*, *Frontiero* v. *Richardson*, and similar cases; or, in the alternative, that the Court note probable jurisdiction over this appeal, and accept same for plenary review.

Respectfully submitted,

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Attorney for Appellants

CERTIFICATE OF SERVICE

I, Frederick P. Gilbert, a member of the Bar of this Honorable Court and counsel of record for the Appellants herein, do hereby certify that I served three copies of this Jurisdictional Statement upon counsel for all Appellees herein, to wit: upon the Hon. Larry Derryberry, Attorney General of the State of Oklahoma, by mailing same to him at his office in the State Capitol Building, Oklahoma City, Oklahoma, Attn: Mr. James Gray, Assistant Attorney General, this 24th day of October, 1975, with first class postage thereon fully prepaid.

In the sense of Supreme Court Rules 10(4) and 48(3), I further certify that the previous Defendants herein not now named as Appellants have no further interest, personal or otherwise, in this litigation; but that in any event their counsel was and would continue to be the Attorney General of Oklahoma, upon whom service is being made as certified in the preceding paragraph.

All Parties required to be served have been served.

FREDERICK P. GILBERT
Attorney for Appellants

APPENDICES

A. THE DECISION BELOW

B. THE JUDGMENT BELOW

C. THE ORDER OVERRULING MOTION FOR NEW TRIAL

D. THE NOTICE OF APPEAL

E. THE SINGLE-JUDGE'S PREVIOUS RULE 12[B][6] DISMISSAL

F. THE TENTH CIRCUIT'S ADJUDICATION OF SUBSTANTIALITY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

MAY 17, 1975

REX B. HAWKS
CLERK, UNITED STATES
DISTRICT COURT
By /s/ VERA EDDLEMAN
DEPUTY

NO. CIV-72-867

MARK WALKER, CURTIS CRAIG,
AND CAROLYN WHITENER, d/b/a
The Honk and Holler,
Plaintiffs,

v.

HONORABLE DAVID HALL, Governor, State of Oklahoma; HONORABLE LARRY DERRYBERRY, Attorney General, State of Oklahoma; D. M. BERRY, Chairman; LAWTON L. LEININGER, Vice-Chairman; J. L. Merrill, Secretary-Member, Oklahoma Tax Commission, State of Oklahoma; ROBERT L. HERT, Presiding District Judge, Ninth Judicial District, State of Oklahoma; CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma; ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma; FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma; and HOWARD W. HOYT, Chief of Police, City of Stillwater, Oklahoma,
Defendants.

Fred P. Gilbert, Attorney, Tulsa, Oklahoma,
for Plaintiffs

Steven E. Moore, James R. Barnett and James H. Gray, Assistant Attorneys General, State of Oklahoma
(Honorable Larry Derryberry, Attorney General,
State of Oklahoma, on the brief)
for Defendants

Before HOLLOWAY, Circuit Judge; DAUGHERTY, Chief Judge, Western District of Oklahoma, and Eubanks, District Judge, Western District of Oklahoma.

HOLLOWAY, Circuit Judge

MEMORANDUM OPINION

Plaintiffs Mark Walker and Curtis Craig, young males wishing to purchase 3.2% beer, and Carolyn Whitener, a licensed beer vendor, [1] seek declaratory and injunctive relief against the defendant State officials to prevent enforcement of certain provisions of Oklahoma law regulating the sale of 3.2% beer. 37 O.S.A. §§241-245. Specifically, plaintiffs challenge the constitutionality under the Fourteenth Amendment to the Federal Constitution of those provisions of the statutes that prohibit sale to males 18 through 20 years of age of 3.2% beer, while allowing such sale to females of the same ages, as applied to such sales for consumption off the premises of the vendor.[2]

Relief is sought in this suit under 42 USCA §1983 and federal jurisdiction is claimed pursuant to 28 USCA

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[1]The claim of plaintiff Walker, as an affected male, is moot since he is now 21 years of age. However, prior to trial a new party plaintiff, Curtis Craig, was added. His date of birth was alleged as September 25, 1955, and it was further averred that he has attempted on numerous occasions to purchase 3.2% beer but has been unable to do so because of the statutory restrictions. He is thus still affected by the statutes so that his claim is not moot.

Plaintiff Whitener is a licensed vendor of 3.2% beer who desires to sell beer to males in the 18 to 20 year age group. It is alleged, and admitted by the defendants, that plaintiff Whitener fails and refuses to make such sales of beer because of the coercive and intimidating effect of past, present and threatened enforcement of the statutes in question and their criminal and administrative sanctions.

No challenge is made to the standing and requisite interest in the controversy of plaintiffs Craig and Whitener, and we are satisfied that their standing and their requisite interest for justiciability are sufficient.

[2]Vendors of "non-intoxicating beverages," which are defined to include 3.2% beer, are required to be licensed for sale of such products for consumption on or off the premises. 37 O.S.A. §§ 163.7 and 163.11. The statutes directly in question here are 37 O.S.A. §§ 241 and 245. § 245 provides as follows:

> § 245. *"Minor defined"*
> A 'minor' for the purposes of Sections 241 and 243 of Title 37 of the Oklahoma Statutes, is defined as a female under the age of eighteen (18) years and a male under the age of twenty-one (21) years.

Section 241 provides:

> §241. *"Sale, barter or gift to minor unlawful"*
> It shall be unlawful for any person who holds a license to sell and dispense beer and/or any agent, servant, or employee of said license holder to sell, barter or give to any minor any beverage containing more than one-half of one per cent alcohol measured by volume and not more than three and two-tenths (3.2) per cent of alcohol measured by weight. Provided, a parent as regards his own child or children, is excepted from the provisions of this Act.

Since 1933, Oklahoma has classified alcoholic beverages as "intoxicating" and "nonintoxicating" and has regulated them separately. Beverages containing more than three and two-tenths percent (3.2%) alcohol by weight are declared to be intoxicating. 37 O.S.A. §163.1. Prior to 1959, intoxicating alcoholic beverages were generally prohibited. Since 1959, intoxicating alcoholic beverages have been regulated under 37 O.S.A. §501, *et seq.* The sale of intoxicating alcoholic beverages is presently prohibited to any person under 21 years of age. 37 O.S.A. §537 (a)(1).

"Nonintoxicating" alcoholic beverages are those beverages containing less than one-half of one percent alcohol by volume and less than 3.2% alcohol by weight. 37 O.S.A. § 163.1. This category is primarily, if not exclusively, composed of 3.2% beer. Nonintoxicating alcoholic beverages are regulated under 37 O.S.A. § 163.1, *et seq.* Since 1953, sale of such beverages to "any minor" has been prohibited. 37 O.S.A. § 241.

(Fn. 2 continued)

§§1343 and 2201. We conclude we have jurisdiction under the jurisdictional grant in §1343. This three-judge court was convened pursuant to 28 USCA §2281. See *Walker* v. *Hall*, No. 73-1267 (10th Cir.), decided October 23, 1973 (unpublished).

After scrutiny of the Oklahoma statutes in question, called for by the sexual classification made, for the reasons outlined below we hold that a rational legislative judgment was made in the alcoholic beverage regulation in question. Regardless of whether the challenges to the law may show it unwise—an argument that is for the legislature—we cannot say the attacks on the law have established that it violates the Federal Constitution.

We uphold the Oklahoma statutes in question for three main reasons: (1) in this case, unlike some others in which the Supreme Court and other courts have invalidated sex-based classifications, proof was made in which we find a rational basis for the legislative judgment underlying the challenged classification; (2) the classification here is directly related to apparent legislative objectives, looking to protection of the persons affected and the public; and (3) the statutes in question

(Fn. 2 continued)

Prior to 1972, a minor in Oklahoma was defined as a male under twenty-one years of age or a female under eighteen years of age. This variation in ages was equalized for most purposes in 1972 with the enactment of 15 O.S.A. § 13:

> Minors, except as otherwise provided by law, are persons under eighteen (18) years of age.

The legislature, did not, however, extend this equalization to the purchase of "nonintoxicating" alcoholic beverages. Along with §13 of Title 15, the legislature enacted 37 O.S.A. § 245, which maintains the old definition of minor for the purposes of §§ 241 and 243 of Title 37. Laws 1972, c. 221, § 9, effective August 1, 1972.

concern the regulation of alcoholic beverages—an area where the States' police powers are strengthened by the Twenty-first Amendment.

The arguments and proof of the parties and our findings are detailed below. This opinion shall constitute the findings of fact and conclusions of law of this court required by Rule 52 of the Federal Rules of Civil Procedure.

I

At the outset we are faced with the recurring problem of the proper standard of review to apply in considering a federal constitutional challenge to a sex-based classification.

The plaintiffs argue that sex is an inherently suspect classification requiring strict scrutiny, so that the defendants are burdened with showing that the classification is necessary to the attainment of a compelling state interest, and that there are no less drastic alternatives to subserve the governmental interest (Brief of Plaintiffs 6-9). They rely on *Frontiero* v. *Richardson*, 411 U.S. 677; *Reed* v. *Reed*, 404 U.S. 71; *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir.); and *Bassett* v. *Bassett*, 521 P.2d 434 (Okla. App.), among other cases.

Defendants argue that the sale, purchase or trade in intoxicants is not a fundamental right; that the State has extraordinary power over the regulation of intoxicants; and that the traditional equal protection test is the proper one to apply here, under which a classification will be upheld if the statutory goals are legitimate and the classification rests on grounds bearing a rational relationship to the statute's objective. They rely on the standard laid down on *Danridge* v. *Williams*, 397 U.S. 471; and *McGowan* v. *Maryland*, 366 U.S. 420 (Brief of Defendants 3-4).

Prior to trial, the court considered one aspect of the problem. We advised the parties that, from a consideration of pertinent cases, the burden of proof rested on the defendants, and that the parties would proceed accordingly at trial. We did not feel required at that time to decide what constitutional standard should apply, it being sufficient then to designate the procedural order for the trial. However, now we must determine the standard to which the Constitution and Supreme Court decisions point. We are not persuaded that the position taken by either party furnishes the answer.

First, we feel the fact that the attack here is on an alcoholic beverage regulation, buttressed by the Twenty-first Amendment, does not call for the use of a less stringent equal protection standard than would otherwise apply, although we feel that this circumstance is to be weighed in our decision. The Supreme Court has recognized that its decisions do not go so far as to hold or say that the Twenty-first Amendment supersedes all other constitutional provisions in the area of liquor regulations. *California* v. *LaRue*, 409 U.S. 109, 115. See also *Hostetter* v. *Idlewild Liquor Corporation*, 377 U.S. 324, 332; *Women's Liberation Union of Rhode Island* v. *Israel*, ___ F.2d ___ (1st Cir. 3/4/75). The demands of the Equal Protection Clause still apply, and the standards of revie that it mandates are not relaxed.

We feel that *Reed* v. *Reed*, 404 U.S. 71, provides the applicable test here. In *Reed* the Court stated, 404 U.S. at 75-76:

> In such situations, §15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (citations omitted) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

Last Term the Court applied the *Reed* test in *Kahn* v. *Shevin*, 416 U. S. 351, 355, in upholding a sex-based classification in a State tax exemption statute. The Court made no reference to the compelling state interest test, despite a vigorous dissent arguing that it applied. And, in fact, the Court observed that "[g]ender has never been rejected as an impermissible classification in all instances." Id. at 356 n. 10.

Moreover, we now have the recent decisions of the Supreme Court in *Stanton* v. *Stanton*, _____ U.S. _____, 43 U.S.L.W. 4449; *Weinberger* v. *Wiesenfeld*, _____ U.S. _____, 43 U.S.L.W. 4393; and *Schlesinger* v. *Ballard*, _____ U. S. _____, 43 U.S.L.W. 4158, as further guidance. While these decisions formulate no new test, they at least demonstrate that the Court has not yet required the showing of a compelling

governmental interest to sustain sex-based classifications.[3] Nor do they indicate a departure from the *Reed* test. We feel we should not impose a more stringent standard for judging the validity of such classifications, in view of the Supreme Court's obvious failure to do so. Hence we apply the *Reed* test.

We do not feel it clear under *Reed* that the ordinary presumptions favoring the validity of state statutes do not fully apply where a sex-based classification is made. Nor does it suffice, we believe, that some state of facts may be conceived by the court that might justify the classification. Compare *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802, 809. Instead we feel the justification for the sex-based classification must be demonstrated by the State. *Lamb* v. *Brown*, 456 F.2d 18, 20 (10th Cir.). Accordingly we have placed the burden of proof on the defendants in our case. We turn now to the evidence they offered in support of the statutory classification, and to the plaintiffs' evidence.

II

The principal proof offered by the defendants to support the rationality of the sex-based classification made by 37 O.S.A. §§ 241 and 245 was some eight exhibits:

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[3]We recognize the dictum in *Duncan* v. *General Motors Corp.*, 499 F.2d 835 (10th Cir.), that the rationality test applied in *Reed* v. *Reed* appears no longer applicable. Id. at 838. The *Duncan* opinion pointed to the plurality opinion in *Frontiero* v. *Richardson*, *supra*. However, the subsequent decisions of the Supreme Court, see *Stanton* v. *Stanton*, *supra*, and other recent cases cited, recognize a higher standard has not yet been imposed by the Court. As stated, we feel we need only follow the formulation of the test set out in *Reed*. See *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir.); *Moritz* v. *Commissioner*, 469 F.2d. 466 (10th Cir.), cert. denied, 412 U.S. 906.

Defendants' Exhibit 1 (see Appendix I hereto) is an extract of data compiled by the Oklahoma State Bureau of Investigation from figures submitted by 194 police and sheriff's departments in Oklahoma, showing a breakdown by age and sex of persons arrested in Oklahoma for alcohol related offenses in the last four months of '973. For the offense of driving under the influence, 427 males in the 18-20 year age group were arrested, as opposed to 24 females. Of the total number of persons of all ages arrested for driving under the influence, 5400 were male and 499 were female. Of those arrested for drunkenness in the 18-20 year age group, 966 were male and 102 were female. However the comparable figures for all ages were 14,713 males and 1,278 females, indicating even more male involvement in such arrests at later ages.

Defendants' Exhibit 2 (see Appendix I hereto) reflects the total number of persons arrested for various crimes by the Oklahoma City Police Department in 1973. For the offense of driving under the influence, 82% of the 18 year olds were male; 98% of the 19 year olds were male; and 94% of the 20 year olds were male. The corresponding percentages for the 21 year old group was 96% male, and for all ages was 92% males.

Defendants' Exhibit 3 (see Appendix I hereto) compiles the results of a random roadside survey of drivers conducted at 19 locations in all quadrants of Oklahoma City during the evening hours in August of 1972 and 1973. In 1972, 78% of the randomly selected drivers under 20 were male. Of this under-20 age group, 84% of the males stated that their drink preference was beer, as opposed to 77% of the females. 16.5% of the males in this age group stated that they had consumed alcoholic beverages within the last two hours

prior to interview, as opposed to 11.4% of the females. 14.6% of the males in this age group had a blood alcohol concentration (BAC) greater than .01%, as opposed to 11.5% of the females. Of those drivers under 20 who had a BAC of greater than .01%, 29.7% of the males and 14.3% of the females had a BAC equal to, or greater than, .05%.

Comparable 1972 figures for drivers of all ages are as follows: 76% of the males and 54% of the females stated their drink preference as beer. 21.2% of the males and 14.1% of the females stated that they had consumed alcoholic beverages within the last two hours. 17.5% of the males and 10.8% of the females had a BAC of greater than .01%. Of those with a BAC of greater than .01%, 51.2% of the males and 36.8% of the females had a BAC equal to, or greater than, .05%.

The 1973 figures, although they contain some variations, reflect essentially the same pattern. In the under-20 age group, a greater percentage of males than females preferred beer, had consumed an alcoholic beverage within the last two hours, and had a significant BAC. As compared to all drivers interviewed, however, the under-20 age group generally showed a lower involvement with alcohol in terms of having drunk within the past two hours or having a significant BAC.

Defendants' Exhibits 4 and 5 are official summaries of motor vehicle traffic collisions in Oklahoma for 1972 and 1973. They show that of all persons killed or injured in motor vehicle collisions, and particularly among drivers, the age group between 17 and 21 suffered the greatest number killed and injured. They further show that the number of males killed and injured in this age group — whether driver or otherwise — exceeded

the number of females (this was generally true for other age groups as well), and that the number of deaths and injuries in the 17-21 age group increased from 1972 to 1973. These statistics did not show the levels of intoxication, if any, of those killed and injured in the 17-21 or other age groups (see Appendix I hereto).

Defendants' Exhibit 6 is an FBI report showing that over the years 1967-72 there had been a nationwide increase of 96% in the number of arrests for driving under the influence, for all ages.

Defendants' Exhibit 7 is a report by the Minnesota Department of Public Safety that shows driver fatalities as a function of blood alcohol concentration, sex and age, offered for the sole purpose of showing that Oklahoma statistics are in line with those of other states.

Defendants' Exhibit 8 is a report on a Joint Conference on Alcohol Abuse and Alcoholism (sponsored by the Departments of Justice, Transportation, and Health, Education and Welfare), referring to a Michigan study of the use of alcohol by persons involved in automobile collisions. Among the points made in the summary and conclusions of that study, the following are particularly relevant:

> Young drivers are not involved in more collisions than older drivers because of the use of alcohol. . . .
>
> In spite of the less significant role of alcohol in highway crashes involving youth, there is an important relationship of alcohol to youth-involvement in collisions which sharply differentiates them from the other age categories up to age 69. This concerns the impact of small amounts of alcohol; i.e., those resulting in

BAC's which are positive but less than 0.05 percent. Among teenagers such low concentrations are an important component in crashes, whereas in all other groups up to age 69 such concentrations are of no significance at all. There is evidence that drivers under 18, who already have the worst collision-vulnerability ratio with nothing to drink, increase that vulnerability threefold after just one or two drinks. At that level (0.01-0.04 percent BAC) all age groups between 25 and 69 appeared in collisions less often than in the control.

. . .

Finally, we cannot blithely explain away a major part of the fatal crash problem among youth and dismiss the remainder as "expected." The fact remains that thousands of young drivers die each year and a substantial number of these unnecessary deaths are related to some use of alcohol.

In response the plaintiffs offered evidence of their own. Their proof consisted primarily of the testimony of two expert witnesses, a psychiatrist and a research psychologist. The psychiatrist testified that, in his opinion, there was no rational justification for the challenged statutory sex classification from a biological, sociological or psychiatric standpoint (Tr. 63-64). He rejected as a "folk myth" the notion of females maturing faster psychologically than males (Tr. 57-58, 70). However, he said it was his impression that males in the 18-20 year age bracket seem to have a greater interest in experimenting with alcohol than females of those ages (Tr. 58-59, 73-74), and that males do tend to use alcohol more readily, and more readily to the point of it being an identifiable abuse (Tr. 94). But he added that this disparity in use and abuse between

males and females extended across all ages and was not confined to the 18-21 year age period, so that to the extent any exclusion by sex was justified, it should be extended to all males (Tr. 94-95).

In addition, plaintiffs offered several exhibits. One exhibit consisted of 1970 federal census data on Oklahoma showing *inter alia*, the total male population in the 18-20 age bracket. This was used as a premise for the argument that defendants' statistics, at best, showed a male alcohol problem which affects so "microscopically slight" a percentage of the total relevant male population as to be virtually *de minimis* from an overall statistical view. (See Brief of Plaintiffs at 37-43, 46). Another exhibit was an Oklahoma study done by the psychologist who testified for plaintiffs. Its conclusions indicated that females were physically no more able, and in some instances were less able, than males to handle comparable alcohol dosages.

III

While the data and testimony are subject to several criticisms, which we recognize,[4] in examining the validity of the statute we are not dealing with proof of absolutes by a particular calculus, nor with proof of the elements of a given legal claim. Instead we are concerned with the broader question whether the proof sufficiently shows a rational basis for the legislative judgment.

---

[4]We realize that part of the data covers periods following enactment of the statute and that the statistical data are subject to various criticisms. Nevertheless, we feel the data are admissible in determining whether a rational basis exists for the classification. We feel that the facts that some proof covered periods after enactment of the statute, and that some statistics were based on surveys of only small percentages of the population, or may be otherwise imperfect, go to the weight of the proof only. Despite these these limitations, we find in the proof a sufficient rational basis for the sex-based classification.

With this in mind, we find in the record sufficient support of the rationality of the limited sex-based classification in question under the *Reed* test. We find such support in the record data indicating more likely consumption of beer by males in the 18-20 age group; more driving in this age group by males with significant BAC levels than by females; the greater number of vehicle injuries in the younger male group; and the apparent relationship of such injuries to alcohol use.[5] We conclude that the classification made has a fair and substantial relation to apparent objectives of the legislation for the protection of those affected and the public generally.[6]

The defendants argue that we should also consider the State's authority to regulate alcoholic beverages as strengthened by the Twenty-first Amendment, and we agree. In addition to their long-standing regulatory power under which the States were competent to prohibit the manufacture, sale or transportation of intoxicating liquors, see *Barbour* v. *Georgia*, 249 U. S. 454; *Mugler* v. *Kansas*, 123 U. S. 623, the authority

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[5]As stated in Part II, supra, the point was raised by the testimony of one of plaintiffs' expert witnesses that the larger male involvement in alcoholic beverage violations extended through older age groups. However, the plaintiffs have not attacked the disparity in treatment of those over and under 21, as such. Their only challenge to the statutory scheme is against the sex-based classification within the 18-20 age group.

Moreover, insofar as the classification affects only the 18-20 age bracket, we note that generally a legislature may address one phase of a problem neglecting the others. See *Jefferson* v. *Hackney*, 406 U.S. 535, 546.

[6]We have no legislative history materials to reveal what the actual purpose of the legislature was. Nevertheless, on consideration of the proof of the State defendants, we feel it apparent that a major purpose of the legislature was to promote the safety of the young persons affected and the public generally.

of the States in this area is reinforced by the Twenty-first Amendment. *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 62. However, as we noted earlier, the Court has recognized that the decisions do not go so far as to hold or say that the Amendment supersedes all other provisions of the Constitution. *California* v. *LaRue*, 409 U. S. 109, 115; and see *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 330; *Women's Liberation Union of Rhode Island* v. *Israel*, _____ F.2d _____ (1st Cir. 3/4/75).

Nevertheless "...the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment...", *California* v. *LaRue*, *supra* at 115, and it is proper that we take into account this "broad constitutional power..." See *Schlesinger* v. *Ballard*, _____ U. S. _____, _____ (Slip opinion 12). In conjunction with the basis for the classification which we find in the proof, we feel the special State regulatory power over alcoholic beverages strengthens the State's case that its statutory classification is valid.

We must consider with special care the recent decision in *Stanton* v. *Stanton*, _____ U. S. _____, 43 U.S.L.W. 4449. The Court held that a Utah law providing generally that the period of minority for males extends to age 21 and for females to 18, "in the context of child support, does not survive an equal protection attack." Id. at _____ (slip opinion 10).

The Utah trial court had held that this provision justified a divorced father in ceasing payments for his daughter's support when she became 18. The Supreme Court of Utah affirmed, rejecting an equal protection challenge to the sex-based classification. As justification for the classification, the Utah Court observed that some

"old notions" continue to prevail, namely that generally it is the man's primary responsibility to provide a home and its essentials for the family; that despite exceptions, it is salutary for him to have a good education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females generally tend to marry earlier than males. 517 P. 2d at 1012.

The Supreme Court reversed, stating (slip opinion 7-8, 10):

> Notwithstanding the "old notions" to which the Utah court referred, we perceive nothing rational in the distinction drawn by [the statutory provision] which, when related to the divorce decree, results in the [father's] liability for support for [his daughter] only to age 18 but for [his son] to age 21. This imposes "criteria wholly unrelated to the objective of that statute." A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. ...If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed. And if any weight remains in this day in the claim of earlier maturity of the female, with a concomitant inference of absence of need for support beyond 18, we fail to perceive its unquestioned truth or its significance,

> particularly when marriage, as the statute provides, terminates minority for a person of either sex.
>
> * * *
>
> We therefore conclude that under any test — compelling state interest, or rational basis, or something in between — § 15-2-1, in the context of child support, does not survive an equal protection attack. In that context, no valid distinction between male and female may be drawn.

We view our case as different from that before the Supreme Court in *Stanton*. The justification offered here for the statutory classification is not based on any "old notions," or on archaic or overbroad generalizations not tolerated under the Constitution. Compare *Stanton*, *supra* at _____ (slip opinion 7-8); *Schlesinger* v. *Ballard*, _____ U. S. _____, 43 U.S.L.W. 4158 (slip opinion 10); *Weinberger* v. *Wiesenfeld*, _____ U. S. _____, 43 U.S.L.W. 4393 (slip opinion 7).[7] Instead, specific and relevant proof was submitted in which we find a rational basis for the statutory classification under the *Reed* test.

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[7]We do not rely on any notions of earlier female maturation, which the expert testimony here rejected, cf. *Stanton* v. *Stanton*, *supra* at _____ (slip opinion 7-8); *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir.), or on similar assumptions.

We also note that the classification in question is not part of a statutory pattern based on overbroad generalizations by which younger males are generally treated differently than females. For most purposes Oklahoma equalized the treatment of males and females in 1972, at the same time that it enacted the statutes challenged here, by providing that all persons under 18 are minors, except as otherwise provided. 15 O.S.A. §13. And in connection with "intoxicating" alcoholic beverages, sale is prohibited to all persons, male and femals, under 21. 37 O.S.A. §537(a)(1).

In sum, we find in the proof a rational basis for the classification, resting on a ground of difference having a fair and substantial relation to apparent objectives of the legislation, sufficient to sustain the statutes.

IV

Plaintiffs further attack the statutory classification on the basis that it erects an unconstitutional irrebuttable presumption. They argue that, even giving defendants' statistics their broadest interpretation, there is no basis for condemning all males of the 18-20 age group since only a minute fraction was shown by the data to present any special danger. They say that to categorize the entire sex on this basis erects a permanent irrebuttable presumption based on a "sex sterotype" that is no longer tolerable, relying on *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, *Vlandis* v. *Kline*, 412 U. S. 441, and similar cases.

We cannot agree. In *Vlandis*, the court defined the constitutional principle limiting irrebuttable presumptions in the following terms, id. at 452:

> "...it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, *and when the State has reasonable alternative means of making the crucial determination.* Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates..." (Emphasis added).

Reliance on such cases is misplaced. They concerned statutes which, in effect, indelibly labelled given individuals to their prejudice, see also *Bell* v. *Burson*, 402 U. S. 535; they did not involve statutes which provide general regulation of group conduct in advance, as here. Further, those cases involved no problem related to a large population group and a regulatory policy that was not amenable to individualized determinations. In contrast, here the plaintiffs' 1970 census data shows some 69,688 males in Oklahoma in the 18-20 age group (Plaintiffs' Ex. 2). We are satisfied that the problem before the legislature here was not one where there was a reasonable alternative means of making the crucial determination. *Vlandis* v. *Kline*, *supra* at 452.

Moreover, the reinforcement of the State's authority by the Twenty-first Amendment is relevant once again. *California* v. *LaRue*, 409 U. S. 109, 115. This is a regulatory field where the State has considerable latitude, as was the case in *Dandridge* v. *Williams*, 397 U. S. 471, 478. Hence, if a classification has a sufficient rational basis, it does not offend the Constitution simply because it is not made with mathematical nicety or results in some inequality. Id. at 485; see also *Kahn* v. *Shevin*, 416 U. S. 351, 355-56 & n. 10.

V

While the case is not free from doubt, we conclude that we should uphold the statutes. We are unpersuaded that the classification violates constitutional principles barring irrebuttable presumptions. Nor are we persuaded by the equal protection challenge. We have subjected the sex-based classification to scrutiny and have required the State defendants to come forward with justification for it. On consideration of the proof,

we find that the record supports the classification as reasonable, not arbitrary, one resting on a ground of difference having a fair and substantial relation to apparent objectives of the legislation. *Reed* v. *Reed*, 404 U. S. 71, 76; *Kahn* v. *Shevin*, 416 U. S. 351, 355. The issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the legislature are within constitutional limitations. Id. at 356, n. 10. We feel that they are.

Accordingly we are entering judgment upholding the statutes and dismissing the action.

/s/ William J. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

/s/ Fred Daugherty
Fred Daugherty, Chief Judge
Western District of Oklahoma

/s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

APPENDIX

Page

Defendants' Exhibit 1 i

Defendants' Exhibit 2 ii

Defendants' Exhibit 3 iii
(w/attachments iii-a through iii-e)

Defendants' Exhibit 4 iv

Defendants' Exhibit 5 v

DEFENDANTS' EXHIBIT 1

PERSONS ARRESTED BY AGE AND SEX FOR THE MONTHS

SEPTEMBER, OCTOBER, NOVEMBER, AND DECEMBER, 1973

IN THE STATE OF OKLAHOMA FOR ALCOHOL RELATED OFFENSES

		18 yrs.	19 yrs.	20 yrs.	Total Persons Arrested 18 - 65 and over
DRIVING UNDER THE INFLUENCE	Male	152	107	168	5,400
	Female	14	2	8	499
DRUNKENNESS	Male	340	321	305	14,713
	Female	39	33	30	1,278

The information contained in this report is summarized crime statistical data compiled from sixty-four (64) Sheriff's Departments and one hundred thirty (130) Police Departments in the State of Oklahoma - 84% population coverage -

(EXCERPT FROM DEFENDANTS' EXHIBIT 1)

DEFENDANTS' EXHIBIT 2

OKLAHOMA CITY POLICE DEPARTMENT
ARREST STATISTICS FOR THE YEAR 1973

Includes those released without having been formally charged.

CLASSIFICATION OF OFFENSES	SEX	AGE 18 yrs.	19 yrs.	20 yrs.	TOTAL For All Ages
DRIVING UNDER THE INFLUENCE	Male	47	54	72	3,206
	Female	10	1	5	279
DRUNKENNESS	Male	102	104	96	9,413
	Female	18	22	19	823

(EXCERPT FROM DEFENDANTS' EXHIBIT 2)

BEST COPY AVAILABLE

DEFENDANTS' EXHIBIT 3

OMEC, Inc.

MANAGEMENT AND ENGINEERING CONSULTING - APPLIED AND BASIC RESEARCH

December 15, 1973

The conditions for the surveys were as follows:

1. Only drivers of passenger cars, pickup trucks and an occasional motorcycle (less than 10 in 1973, none in 1972) were asked to participate.

2. Drivers were selected at random from vehicles actually in operation on the streets and highways of Oklahoma City.

3. The surveys took place during the month of August in 1972 and 1973.

4. Interviews with drivers were accomplished at nineteen different locations covering all quadrants of Oklahoma City between the hours of 6:00 p.m. - 10:00 p.m. and 11:00 p.m. - 3:00 a.m. on all seven days of the week.

5. Approximately 6 to 7 percent of those asked to participate refused to do so. These appeared to be scattered randomly over all age-sex-race groups in the population of interest, namely drivers of the motor vehicles mentioned in 1., above.

6. Blood Alcohol Concentrations were taken by trained operators utilizing a Stephenson Model 900 Breathalyzer. An accompanying Mark calibration unit was utilized to insure accuracy of the device.

7. Total number of interviews taken was 1600 in 1972 and 1510 in 1973. Total number of interviews with drivers under 20 years of age was 313 in 1972 and 306 in 1973.

(EXCERPT FROM PAGE 1 OF DEFENDANTS' EXHIBIT 3)

TABLE I. PARTIAL DATA SUMMARY, 1972 and 1973 Roadside Survey, Oklahoma City Oklahoma, OMEC, Inc.

RESPONDENT	Males Less Than 20 Years		All Males		Females Less Than 20 Years		All Females	
YEAR	1972	1973	1972	1973	1972	1973	1972	1973
Drink Alcoholic Beverages--Yes (Percent)	70.4	75.6	75.5	75.2	68.6	70.6	59.9	60.2
Drank Alcoholic Beverages in Last 2 hours--Yes (Percent)	16.5	15.6	21.2	21.6	11.4	11.7	14.1	10.9
BAC Greater Than .01 (Percent)	14.6	8.4	17.5	16.7	11.5	7.4	10.8	7.8
BAC Greater Than or Equal To .05 Given BAC Greater Than .01 (Percent)	28.7	50.0	51.2	52.3	14.3	0.0	35.8	40.7
Average Miles Driven	15,670	16,794	19,360	20,042	10,471	10,456	10,803	11,399
Average Days/ Week Driving Vehicle	6.8	6.7	6.7	6.7	6.7	6.5	6.5	6.4
Number of Participants	243	238	1246	1161	70	68	354	349

TABLE 2. TOTAL MALES

Total Males (Number)	1972: 1246 1973: 1161			
a. Positive BAC	1972:	BAC	Number	Percent
		00	984	78.97
		01	39	3.13
		02	44	3.53
		03	29	2.33
		04	33	2.65
		05	16	1.28
		06	18	1.44
		07	16	1.28
		08	20	1.61
		09	11	.88
		10	2	.16
		11	6	.48
		12	5	.40
		13	4	.32
		14	3	.24
		15	4	.32
		16	3	.24
		17	1	.08
		18	1	.08
		19	1	.08
		Refused	6	.48
	1973:	00	950	81.83
		01	14	1.21
		02	30	2.58
		03	32	2.76
		04	25	2.15
		05	19	1.64
		06	17	1.46
		07	14	1.21
		08	12	1.03
		09	9	.78
		10	7	.60
		11	5	.43
		12	3	.26
		13	5	.43
		14	2	.17
		15	6	.52
		18	2	.17
		21	1	.09
		24	1	.09
		25	1	.09
		Refused	6	.52

TABLE 2. (Continued)

b. Do you drink? Yes.	1972:		941	75.52%
	1973:		873	75.19%
c. Drink preference.	1972:	Beer:	713	75.77%
		Wine:	69	7.33%
		Liquor:	159	16.90%
	1973:	Beer:	643	73.65%
		Wine:	80	9.16%
		Liquor:	150	17.18%
d. Drank In Last 2 Hours? Yes.	1972:		264	21.19%
	1973:		251	21.62%

TABLE 3. MALES UNDER 20

Males Under 20 (Number)	1972: 243 1973: 238			
a. Positive BAC	1972:	BAC	Number	Percent
		00	207	81.82
		01	9	3.56
		02	10	3.95
		03	8	3.16
		04	8	3.16
		05	2	.79
		06	4	1.58
		08	2	.79
		09	2	.79
		11	1	.40
	1973:	00	217	91.18
		01	1	.42
		02	4	1.68
		03	3	1.26
		04	3	1.26
		05	2	.84
		06	4	1.68
		07	1	.42
		09	2	.84
		10	1	.42
b. Do you drink? Yes.	1972:		171	70.37%
	1973:		180	75.63%
c. Drink preference.	1972:	Beer:	143	83.63%
		Wine:	13	7.60%
		Liquor:	15	8.77%
	1973:	Beer:	144	80.00%
		Wine:	21	11.67%
		Liquor:	15	8.33%
d. Drank In Last 2 Hours? Yes.	1972:		40	16.46%
	1973:		37	15.55%

iii-c

TABLE 4. TOTAL FEMALES

Total Females (Number)	1972: 354 1973: 349				
a. Positive BAC	1972:		BAC	Number	Percent
			00	306	86.44
			01	8	2.26
			02	16	4.52
			03	3	.85
			04	5	1.41
			05	4	1.13
			06	3	.85
			07	1	.28
			08	1	.28
			09	1	.28
			10	1	.28
			12	2	.56
			14	1	.28
			Refused	2	.56
	1973:		00	317	90.83
			01	2	.57
			02	6	1.72
			03	7	2.01
			04	3	.86
			05	4	1.15
			07	3	.86
			08	2	.57
			09	1	.29
			10	1	.29
			20	1	.29
			Aborted	1	.29
			Refused	1	.29
b. Do you drink? Yes.	1972:			212	59.89%
	1973:			210	60.17%
c. Drink preference.	1972:	Beer:		114	53.77%
		Wine:		30	14.15%
		Liquor:		68	32.08%
	1973:	Beer:		93	44.29%
		Wine:		36	17.14%
		Liquor:		81	38.57%
d. Drank in Last 2 Hours? Yes.	1972:			50	14.12%
	1973:			38	10.89%

TABLE 5. FEMALES UNDER 20

Females Under 20 (Number)	1972: 70 1973: 68				
a. Positive BAC	1972:		BAC	Number	Percent
			00	61	87.14
			01	2	2.86
			02	3	4.29
			03	2	2.86
			04	1	1.43
			06	1	1.43
	1973:		00	63	92.65
			02	2	2.94
			03	3	4.41
b. Do you drink? Yes.	1972:			48	68.57%
	1973:			48	70.59%
c. Drink preference.	1972:	Beer:		37	77.08%
		Wine:		4	8.33%
		Liquor:		7	14.58%
	1973:	Beer:		24	50.00%
		Wine:		12	25.00%
		Liquor:		12	25.00%
d. Drank in Last 2 Hours? Yes.	1972:			8	11.43%
	1973:			8	11.76%

DEFENDANTS' EXHIBIT 4

O K L A H O M A

SUMMARY OF MOTOR VEHICLE TRAFFIC COLLISIONS

SUMMARY OF STATEWIDE COLLISIONS FOR YEAR 1972 (Month or other period)

This Summary includes reports and information available on March 19, 1973, FROM REPORTS OF COLLISIONS INVESTIGATED BY POLICE OFFICERS.

NUMBER OF PERSONS KILLED AND INJURED

AGE GROUP		TOTAL				DRIVER			
		KILLED		INJURED		KILLED		INJURED	
		MALE	Female	MALE	Female	MALE	FEM.	MALE	FEM.
17-21	Municipal	34	8	1640	1277	16	4	932	637
	Other	82	26	1171	629	49	10	681	261
	Statewide	116	34	2811	1916	65	14	1613	898

(EXCERPT FROM PAGE 7 OF DEFENDANTS' EXHIBIT 4)

DEFENDANTS' EXHIBIT 5

O K L A H O M A

SUMMARY OF MOTOR VEHICLE TRAFFIC COLLISIONS

SUMMARY OF STATEWIDE COLLISIONS FOR YEAR 1973 (Month or other period)

This Summary includes reports and information available on April 15, 1974 FROM REPORTS OF COLLISIONS INVESTIGATED BY POLICE OFFICERS.

NUMBER OF PERSONS KILLED AND INJURED

AGE GROUP		TOTAL				DRIVER			
		KILLED		INJURED		KILLED		INJURED	
		MALE	Female	MALE	Female	MALE	FEM.	MALE	FEM.
17-21	Municipal	34	13	1796	1373	16	6	995	695
	Other	91	27	1277	676	53	9	745	292
	Statewide	125	40	3073	2049	69	15	1740	987

(EXCERPT FROM PAGE 7 OF DEFENDANTS' EXHIBIT 5)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FILED FOR THE WESTERN DISTRICT OF OKLAHOMA

MAY 17, 1975

REX B. HAWKS
CLERK, UNITED STATES
DISTRICT COURT
By /s/ VERA EDDLEMAN
DEPUTY

NO. CIV-72-867

MARK WALKER, CURTIS CRAIG,
and CAROLYN WHITENER, d/b/a
The Honk and Holler,
Plaintiffs,

v.

HONORABLE DAVID HALL, Governor, State of Oklahoma; HONORABLE LARRY DERRYBERRY, Attorney General, State of Oklahoma; D. M. BERRY, Chairman; LAWTON L. LEININGER, Vice-Chairman; J. L. MERRILL, Secretary-Member, Oklahoma Tax Commission, State of Oklahoma; ROBERT L. HERT, Presiding District Judge, Ninth Judicial District, State of Oklahoma; CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma; ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma; FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma; and HOWARD W. HOYT, Chief of Police, City of Stillwater, Oklahoma,
Defendants.

Fred P. Gilbert, Attorney, Tulsa, Oklahoma, for Plaintiffs

Steven E. Moore, James R. Barnett and James H. Gray, Assistant Attorneys General, State of Oklahoma (Honorable Larry Derryberry, Attorney General, State of Oklahoma, on the brief) for Defendants

Before HOLLOWAY, Circuit Judge; DAUGHERTY, Chief Judge, Western District of Oklahoma, and Eubanks, District Judge, Western District of Oklahoma.

J U D G M E N T

On consideration of the evidence, the briefs and arguments of counsel, and in accordance with the court's Memorandum Opinion, which constitutes our findings and conclusions herein,

It is ORDERED that judgment be and is entered adjudging that the Oklahoma statutes in question, 37 O.S.A. §§ 241 and 245 are valid; that all relief sought by the complaint is denied; and that the action is dismissed.

/s/ William J. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

/s/ Fred Daugherty
Fred Daugherty, Chief Judge
Western District of Oklahoma

/s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

Judgment entered in Civil Docket on 5-17-75 — Adelaide Holston, Deputy.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

JUL 14, 1975

REX B. HAWKS
CLERK, UNITED STATES
DISTRICT COURT
BY ZETA M. COWAN
DEPUTY

NO. 72-867-Civil

MARK WALKER, CURTIS CRAIG, and
CAROLYN WHITENER, d/b/a
The Honk and Holler,
Plaintiffs,

v.

HONORABLE DAVID HALL, Governor, State of Oklahoma; HONORABLE LARRY DERRYBERRY, Attorney General, State of Oklahoma; D. M. BERRY, Chairman; LAWTON L. LEININGER, Vice-Chairman; J. L. MERRILL, Secretary-Member, Oklahoma Tax Commission, State of Oklahoma; ROBERT L. HERT, Presiding District Judge, Ninth Judicial District, State of Oklahoma; CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma; ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma; FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma; and HOWARD W. HOYT, Chief of Police, City of Stillwater, Oklahoma,
Defendants.

ORDER OVERRULING MOTION FOR NEW TRIAL

On consideration of the motion for new trial filed by the plaintiffs, and their memorandum in support of motion for new trial, it is hereby ORDERED that said motion for new trial is overruled.

The Court is appreciative of the thorough presentation of this case by all counsel.

Dated this 14 day of July, 1975.

/s/ William J. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

/s/ Fred Daugherty
Fred Daugherty, Chief Judge
Western District of Oklahoma

/s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

AUG 11, 1975

REX B. HAWKS
CLERK, UNITED STATES
DISTRICT COURT
BY WALTER W. MOUNTS
DEPUTY

No. CIV-72-867

MARK WALKER
and
CURTIS CRAIG
and
CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Plaintiffs,

vs.

Hon. DAVID HALL, Governor,
Hon. LARRY DERRYBERRY,
Hon. D. M. BERRY,
Hon. LAWTON L. LEININGER,
Hon. J. L. MERRILL,
Hon. ROBERT L. HERT,
Hon. CHARLES H. HEADRICK,
Hon. ROSE JARVIS,
Hon. FRANK PHILLIPS,
and
Hon. HOWARD W. HOYT,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that the Plaintiffs above-named hereby appeal to the Supreme Court of the

United States the decision and judgment of the District Court herein of May 17, 1975, motion for new trial overruled July 14, 1975.

This appeal is taken pursuant to 28 U.S.C. 1253.

August 10, 1975

/s/ Fred Gilbert
FRED P. GILBERT
1401 National Bank of Tulsa Bldg.
Tulsa, Oklahoma 74103

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Frederick P. Gilbert, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served this Notice of Appeal upon the Defendants herein by mailing a copy thereof to the counsel of record for all Defendants herein, to wit: the Hon. Larry Derryberry, Attorney General of the State of Oklahoma, to him at his office in the State Capitol Building, Oklahoma City, Oklahoma, Attn: Mr. James Gray, Assistant Attorney General, this 10th day of August, 1975, with first class postage thereon fully prepaid.

All parties required to be served have been served.

/s/ Fred Gilbert

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

FEB 14, 1973
REX B. HAWKS
CLERK, UNITED STATES
DISTRICT COURT
/s/ RUTH T. OLSEN

No. CIV-72-867

MARK WALKER and
CAROLYN WHITENER, d/b/a
the "Honk and Holler",
Plaintiffs,

vs.

HONORABLE DAVID HALL, GOVERNOR, STATE OF OKLAHOMA; HONORABLE LARRY DERRYBERRY, ATTORNEY GENERAL, STATE OF OKLAHOMA; CLARENCE L. DeWEES, CHAIRMAN, LAWTON L. LEININGER, VICE-CHAIRMAN, M. C. CONNORS, SECRETARY-MEMBER, OKLAHOMA TAX COMMISSION, STATE OF OKLAHOMA; ROBERT L. HERT, PRESIDING DISTRICT JUDGE, NINTH JUDICIAL DISTRICT, STATE OF OKLAHOMA; CHARLES H. HEADRICK, DISTRICT ATTORNEY, NINTH JUDICIAL DISTRICT, STATE OF OKLAHOMA; ROSE JARVIS, DISTRICT COURT CLERK, PAYNE COUNTY, STATE OF OKLAHOMA; FRANK PHILLIPS, SHERIFF, PAYNE COUNTY, STATE OF OKLAHOMA; and HOWARD W. HOYT, CHIEF OF POLICE, CITY OF STILLWATER, OKLAHOMA,
Defendants.

ORDER OF DISMISSAL

This cause came on for consideration by the Court upon the motion of the defendants, David Hall, Governor, State of Oklahoma, Larry Derryberry, Attorney General, State of Oklahoma, Clarence L. DeWees, Chairman, Lawton L. Leininger, Vice-Chairman, M. C. Connors, Secretary-Member, Oklahoma Tax Commission, State of Oklahoma, Robert L. Hert, Presiding District Judge, Ninth Judicial District, State of Oklahoma, Charles H. Headrick, District Attorney, Ninth Judicial District, State of Oklahoma, Rose Jarvis, District Court Clerk, Payne County, State of Oklahoma, Frank Phillips, Sheriff, Payne County, State of Oklahoma, and Howard W. Hoyt, Chief of Police, City of Stillwater, Oklahoma, to dismiss this action pursuant to Rule 12, Federal Rules of Civil Procedure; and the Court, having carefully considered the files in this cause together with Briefs of counsel, is of the opinion that this cause should be dismissed for the following reasons:

1. This Court is without jurisdiction for the reason that the Complaint does not state a claim upon which relief can be granted, and

2. The state law is a valid exercise of the State's power pursuant to the Twenty-First Amendment of the United States Constitution. *California* v. *LaRue*, _____ U. S. _____, 34 L.Ed.2d 342, 93 S.Ct. 390 (1972); *Seagram* v. *Hostetter*, 384 U.S. 35, 16 L.Ed.2d 336, 86 S.Ct. 1254 (1966); *Mahoney* v. *Triner Corp.*, 304 U.S. 401, 82 L.Ed. 1424; *Goesaert* v. *Cleary*, 335 U.S. 464, 93 L.Ed. 163; *Krauss* v. *Sacramento Inn*, 314 F.Supp. 171 (E.D.Cal. 1970).

THEREFORE, the Complaint is dismissed as to all parties.

Dated this 13th day of February, 1973.

/s/ Stephen S. Chandler
United States District Judge

APPENDIX F

FILED

OCT 23, 1973

HOWARD K. PHILLIPS
CLERK, UNITED STATES
COURT OF APPEALS
TENTH CIRCUIT

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER, 1973, TERM

No. 73-1267

MARK WALKER and CAROLYN WHITENER,
d/b/a the "Honk and Holler",
Plaintiffs-Appellants,

v.

HONORABLE DAVID HALL, GOVERNOR,
State of Oklahoma, et al,
Defendants-Appellees,
and
HONORABLE STEPHEN S. CHANDLER,
United States District Judge,
Respondent.

Fred P. Gilbert, Tulsa, Oklahoma, for Appellants.

Steven E. Moore, Assistant Attorney General (Larry Derryberry, Attorney General, on the brief), Oklahoma City, Oklahoma, for Appellees.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(District Court No. Civ. 72-867)

Before CLARK,* Associate Justice, LEWIS, Chief Judge, and HILL, Circuit Judge.

PER CURIAM.

The question before us on this appeal concerns the refusal of the trial court to comply with the request by the plaintiffs in that court for the convening of a three-judge court pursuant to 28 U.S.C. § 2281 et seq.

Appellants, plaintiffs in the trial court, by the allegations of their complaint attacked the constitutionality of an Oklahoma statute, 37 O.S. 241 to 245, inclusive. In substance this statute pertains to the sale of 3.2 beer in the state, it permits such sales to females over the age of 18 years and prohibits such sales to males until they reach the age of 21 years. The complaint alleges the statute is unconstitutional as violative of the equal rights protection clause of the Fourteenth Amendment to the Constitution of the United States and, in seeking to enjoin the enforcement of the state statute, urges unconstitutional sex discrimination. Appellees, by their motion to dismiss which was sustained by the trial court, relied heavily on the Twenty-First Amendment as authority for the state to enact the questioned statute.

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* Associate Justice, United States Supreme Court, Retired, sitting by designation.

From these basic legal contentions, we must conclude the existence of a substantial federal constitutional question. Thus the case comes clearly within the purview of 28 U.S.C. § 2281 and a three-judge court must be convened in accordance with 28 U.S.C. § 2284.

The order granting the motion to dismiss is VACATED and the case is REMANDED for further proceedings consistent herewith. The alternative relief requested by appellants is denied with the observation that our disposition of the appeal should not be construed as any indication of our thoughts concerning the merits of the case or defenses raised thereto.